JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 110 & 111/95

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA

VS.

DESMOND ROBINSON
REUBEN MITCHELL

Delano Harrison for Robinson

Dennis Morrison, Q.C. for Mitchell

Bryan Sykes and David Fraser for the Crown

November 4.5.6.7. 1996 and January 20. 1997

RATTRAY P.:

On Friday 16th July 1993 Mr. Carlton Pryce also known as 'Neilie', a taxi operator drove his taxi cab home to Eleven Miles, Bull Bay, where he lived with Miss Ena Small the mother of his son. Miss Small gave evidence of his leaving home shortly after his arrival and after eating a little of his dinner. In the taxi cab with him when he left, sitting in the front seat, she saw the appellant Reuben Mitchell whom she knew for a very long time and who is also known as Hopie. The car reversed out of the yard with Carlton driving and Hopie sitting beside him. That was the last occasion on which Miss Small saw Carlton Pryce alive. Next day she went to work but on returning home she realised he had not returned. which was unusual. She reported the matter to the Police

at Bull Bay, and on the following Tuesday made a further report to the Central Police Station, Kingston and then went home. When she was at home that day she was visited by the police who took her to Cambridge Hill in St. Thomas. There, in a gully she saw the body of Carlton Pryce lying on his left side on his shirt. He was dead. She has not seen the taxi cab since Carlton drove it from their home on the Friday night.

Det. Cpl. Vincent Campbell gave evidence of receiving information which led him to Cambridge Hill where he saw "over the side of the road in the banking of a gully" the decomposed body of an adult male with stab wounds all over the body. His investigations led him to contact Miss Ena Small and still later on the 3rd September to the arrest of the appellant Mitchell on a charge of murder at the Yallahs Police Station. When told by Det. Cpl. Campbell that he had a warrant for his arrest the appellant Mitchell told him he had already given a statement to Mr. Fairweather and that it was not he Hopie who did it but "Trash" whom he identified as Desmond Robinson the other appellant. He arrested and charged the appellant Mitchell with the murder of Carlton Pryce. Later in September he saw Desmond Robinson at the Yallahs Police Station and after cautioning him Robinson told him that he had given a statement to Mr. Fairweather already. He also said:

> **"A di one Hopie kill Neilie you know sah**
> **and drive wey him car."**

He likewise arrested and charged the appellant Robinson with the murder of Carlton Pryce.

Dr. Aung T. Thein a Medical Practitioner performed a postmortem examination on the body of Carlton Pryce. He found the following injuries:

1. **Incised wound where the back of the right heel was chopped off.**

2. **Two penetrating injuries round or oval in shape 0.3 diametres each with depth bone deep, on the back of the head. These could have been inflicted by an instrument like an ice pick.**

3. **Lower half of left ear was chopped off. This could have been inflicted by something similar**

to machete.

4. A stab wound to chest over the fifth rib penetrating the heart inflicted by a sharp knife or any sharp instrument.

5. A stab wound over the eighth rib penetrating the lung and the pleura inflicted by a sharp instrument.

6. Two stab wounds on the left arm inflicted by a sharp instrument.

The cause of death was:

(a) sudden death from cardiac arrest due to stab wound to the heart;

(b) contributory - multiple stab wounds causing haemorrhage.

The chopping off of the heel was most likely caused by an instrument like a machete.

A leading question was asked by Crown Counsel:

"Q Now, Doctor, from the injuries that you saw, it is possible that more than one weapon was used to inflict these injuries?

A: At least two weapons were used, more than one."

In cross-examination and with respect to the injury to the heel he said: "Anything sharp and long blade can cause the injury."

Evidence was ruled admissible after a voire dire of voluntary statements given by both appellants to the police and indeed the Crown's case rests heavily upon these statements.

Det. Cpl. Campbell recalled, gave evidence that the Cambridge Hill Road is a road not frequently used off the main road from Kingston to St. Thomas. He denied that himself and Sgt. Kermit Fairweather had locked the appellant Robinson in a room at the Yallahs Police Station and beat him forcing him to copy his name on the bottom of a prepared document presented to him for signature. Counsel for Robinson suggested that the name was copied by the appellant who cannot write from a script given to him by the two police officers. This was done under duress. The suggestion was denied.

Det. Cpl. Kermit Fairweather gave evidence that he saw the appellant Mitchell on the 3rd September 1993 at the Yallahs Station lock-up about 8:20 a.m. to 8:30 am. and the appellant told him he wanted to give a statement. He sent across the road to call a Justice of the Peace Mr. Reuben Loague. On Mr. Loague's arrival the appellant dictated a statement which he requested Sgt. Fairweather to write down. Sgt. Fairweather read over the statement which was prefaced by the necessary cautions to the appellant who signed it. Justice of the Peace Mr. Loague signed the statement as witness. Mr. Loague was present throughout the taking of the statement. He supported the evidence of Sgt. Fairweather.

The statement reads as follows:

> "It was on a Friday. A know dis guy by the name Desmond Robinson, otherwise known as 'Trash', said to me he would like me to go to Summerset for a power saw and if I know anyone could assist him with a vehicle.
>
> Sgd/Reuben Mitchell 3//9/93 wit/ R. Loague J.P.
>
> I told him yes a know someone at Bull Bay. I go with him to see the person who is Mr. Neil. He talk to Mr. Neil. Afterwards Mr. Neil leave me and Desmond for a short time and him come back. Mr. Neil and Desmond then leave in a Blue Austin motor car and say them a go buy gas at Harbour View. I then took a bus and go to Albion at my mother's house. At about 9:00 p.m. I was at Albion crossing when Mr. Neil drive the said car with Desmond and another man I hear them call 'Shortie'. Desmond tell me dem ready fi go a Sommerset. We all left in the car to Sommerset. Desmond and Shortie left me and the driver in the square and say him ago pick up the thing. About twenty-five minutes after they come back without anything, and Mr. Desmond say him a go rob Mr. Sie ganja and me tell him I don't into that for me know Mr. Sie.
>
> Sgci/ Rueben Mitchell 3/9/93 wit/ Mr. L. Loague J.P
>
> (3)
>
> We drive off and go through Cambridge Hill. When we reach on top of a hill we make a stop. Desmond, the driver and Shortie come out go to the back of the car and start to talk. I was sitting in the front seat of the car. I could not hear what they were saying. I hear a struggle and Mr. Neil calling out fi help. Me look out and see Shortie and Desmond hold on to Mr. Neil. Mr. Neil drop to the ground and Desmond and Shortie run to the car with

blood stain knife in their hand. Desmond come to the front where we was and tell me fi go over and drive and Shortie go in the back seat.

Me drive di car and dem say me fi go to town. Them direct me to di lane beside di gas station at Duke Street. They tell me to stay with them till the morning.

In the morning me see Spanner who was passing.

Sgd. Reuben Mitchell 3/9/93 wit/ R. Loague J.P.

So I move away very fast and leave with Spanner. The same Saturday evening about 5:00 p.m. - 6:00 p.m. I saw Mr. Desmond at the coal yard at Spanish Town Road. I asked him if a di business we go bout and it work to be a problem. He said, you fi go fi you ways and me go fi me. I don't see any of them since. About two weeks after a hear say dem find Mr. Neil dead in a Cambridge Hill area, stab up.

Sgd/ Reuben Mitchell
3/9/93
wit/ R. Loague J.P.

The above statement was read over to me and I have been told that I could add, correct or alter anything I wish. This statement is true. I made it of my own free will.

Sgd/ Reuben Mitchell
3/9/93
wit/ Reuben Loague J.P.

Taken down by me this 3/9/93 at Yallahs Police Station in the presence of J.P. Loague and Corporal Reynolds. It was read over to maker who was told he could add, correct or alter anything he wished. Statement commenced at 12:45 p.m. and concluded 1:45 p.m.

Sgd/ K.W. Fairweather, Det. Sgt."

Sgt. Fairweather further gave evidence that on the 16th September 1993 at about 8:20 a.m. he was passing the cell block at the Yallahs Police Station when the applicant Desmond Robinson called out to him saying: "Mr. Fairweather I want to tell you about mi case." He asked Robinson if he wanted to make a statement about it, and Robinson replied, yes. He sent for Mr. Ross, a Justice of the Peace, who was in the Station at the time, and went to his office where the prisoner was taken. In his office and in the presence of Mr. Ross the statement was written down by him at the

request of the appellant, read over to him with the relevant cautions and signed by the appellant in the presence of Mr. Ross, J.P. who witnessed the statement.

The statement reads as follows:

> **"On Friday evening Hopie Mitchell come to me home at 43 Mark Lane, Kingston and tell me say him would like me to follow him go some way. Me asked him where, and him say him want to go to Bull Bay to check a car man fi pick up something fi him. Me and Hopie tek a bus and come off a Bull Bay and wait pon di road fi about one hour. Mi say to him weh di man deh and him say you soon see for him run taxi on de road. When the man come Hopie go talk to di man and after words de man drive off. Hopie say di man gone eat him dinner and bathe. When di man come back about 10:00 p.m. we go in a di car. Me sit in the front passenger seat and Hopie sit in di back seat behind the driver. We drive go Cambridge Hill direction. After we reach pon top of di hill weh de truck draw shale me see Hopie grab di driver under him chin and use de other hand fi hold a knife a him neck, and slashed him throat. Same time di car run up in a de banking and stop. As de car stop mi come out and him and di man a rastle in a de car. Hopie stab up di man all over him body. Mi say to Hopie, a nuh dis you say you a come do, what you stab de man fah? Him say a long time him a carry, grievance fi him and now him a tek revenge. After Hopie kill de driver him draw him from round the wheel and roll him over di gully. We go in a di car and Hopie drive di car to Old Harbour say him a go look sale fi de car. We stay a Old Harbour till di Saturday night and we leave and to Waltham Park, Kingston. Di Sunday morning about 10 a.m. a leave Hopie at Waltham Park and go home. The next week Sunday Hopie come to me yard and said Trasha see it bus you know. Me say to him what bust and him say di man what mi kill and dem a call fi you and mi name. Hopie then say we have fi run way. De same Sunday morning when him tell mi say it bust me say to him, Hopie you remember what did driver did say when we all in a di car. Him say him don't remember, so mi tell him say di driver did say him girl friend asked him where him a go and him say him and Hopie a go out.**
>
> **/s/ Desmond Robinson**
> **16.9.93**
> **wit: Allan B. Ross. J.P.**
> **St. Thomas**
> **16.9.93**
>
> **The above statement was read over to me. I have been told I could correct, add, alter anything I wish. This statement is true I made it of my own free will.**
>
> **/s/ Desmond Robinson**

16.9.93
wit: Allan B.W. J.P.
St. Thomas
16.9.93

Taken down by me this 16-9-93 at Yallahs Police Station CIB office, St. Thomas. It was read over to the maker who was told he could add, alter or correct anything he wished. The statement concluded at 9:00 a.m.

/s/ K. Fairweather Det. Sgt.
16.9.93."

In cross-examination Sgt. Fairweather admitted that he had spoken to the appellant Mitchell about 12:30 p.m. and not 8:20 a.m. - 8:30 a.m. as he had said in his evidence. This is supported by the time on the statement taken, recorded as commencing at 12:45 p.m. He denied any suggestion that the appellant only signed the document after being beaten up and shocked with electric wire in order to force him to sign it. Robinson had been taken from the lock-up in St. Andrew to the Yallahs Station on the 12th September. Justice of the Peace Mr. Allan Ross gave evidence supporting Sgt. Fairweather on the taking of the statement and the circumstances under which it was taken.

A no case submission made in the absence of the jury was rejected by the Learned Trial Judge.

The appellant Reuben Mitchell first gave evidence. Although he admitted knowing Ena Small, he denied going to her home on the 16th of July 1993 and being in the front seat of the deceased's car. He did not know Carlton Pryce. He narrated being taken from the Hunt's Bay Police lock-up to the Yallahs Police Station lock-up on the 31st August 1993. On the 3rd September he was taken to Mr. Fairweather's office who spoke to him. Shortly after Det. Sgt. Campbell came in and he described how he was beaten, shocked with electric wire and forced to sign a statement already prepared. Justice of the Peace Mr. Loague was never present. He did not know anyone called "Trash" He denied having participated in the murder of Carlton Pryce.

The appellant Desmond Robinson likewise denied voluntarily making the statement attributed to him. He was taken from the cell block by Mr. Campbell and Mr. Fairweather to the guardroom and beaten with a baton and electric wire when he said he knew nothing about the murder. A sheet of paper with writing was presented to him. He told them he could not read or write. Cpl. Campbell wrote his name on a piece of paper and told him to copy it off. He did this "because of the licking". He denied any knowledge of the murder. Justice of the Peace Ross was never present during the incident. He denied knowing the co-accused Mitchell or anyone named Hopie, as well as anything about the events narrated in the statement.

The evidence to be considered in respect of the appellants in its totality therefore rests:

(a) In respect of Reuben Mitchell:

(i) having been seen by Ena Small in the taxi cab when the deceased was driving it from their home;

(ii) his statement to the police which establishes his presence at the scene of the murder at the time of the murder;

(iii) the medical evidence in so far as any adverse inferences may be drawn therefrom;

(b) In respect of Desmond Robinson:

(i) his statement to the police establishing his presence at the murder scene at the time of the murder;

(ii) the medical evidence if inferences adverse to the appellant can be drawn therefrom.

Before us Mr. Delano Harrison, counsel for the appellant Desmond Robinson has urged several grounds of appeal which I will separately deal with.

He submits:

1. The inadequacy and unfairness of the Learned Trial Judge's summing-up on significant aspects of the defence.

The areas about which complaint was made refer to the Judge's comments on how the signature was copied as stated by the appellant and the appellant's alleged lack of knowledge of the Cambridge Hill area as well as what the prosecution was pointing out as lies in the appellant's caution statement. The Judge's reference to lies is clearly telling the jury what the prosecution is positing both in relation to his lack of knowledge of the Cambridge Hill area, and parts of the content of the cautioned statement. He told the jury:

> **"It is for you members of the jury to find if each has lied. If you so find that each man has lied, you are entitled to ask yourself why. Remember also the mere fact that an accused lies is not itself evidence of guilt."**

With respect to the medical report the Learned trial Judge says inter alia:

> **"The prosecution says he lies although he places himself on the scene. He has lied because no postmortem report shows any slashing of the throat."**

I can find no merit in the submission of the inadequacy and unfairness of the Trial Judge's summing-up as complained of on behalf of the applicant.

> **2. That the Trial Judge usurped the jury's function in his direction on the medical evidence by suggesting that the evidence established two assailants.**

The doctors opinion was that two weapons were used to inflict the injuries on the deceased. He arrived at this opinion from the types, of injuries which he found on the deceased.

The Trial Judge directed as follows:

> **"You will recall the doctor, who conducted the Post-mortem examination, identified 2 types of injuries and in his opinion there were 2 persons or 2 weapons at least on the scene so 2 persons inflicted injuries to the deceased. The prosecution says what the Doctor saw is circumstantial evidence of a joint enterprise because the heel chopped off, the stabbing to the head back and the stabbing to the torso, here he said that is circumstantial evidence - joint enterprise and**

> **you look at it to see if that is so." [Emphasis mine.]**

The Trial Judge erred in saying that the doctor in his evidence gave the opinion that two persons inflicted the injuries to the deceased. What the doctor said was "at least two weapons were used, more than one" having admitted in cross-examination with respect to the injury to the heel that:

> **"With my experience of performing post-mortem examinations, anything sharp and long blade can cause the injury."**

His evidence really discloses the injury to the back of the head was inflicted by an instrument like an ice pick and the rest of the injuries could have been by "anything sharp with a long blade." Can a reasonable inference be drawn from the doctor's evidence that two persons inflicted injuries on the deceased? I would think not. Furthermore he certainly did not say so as was ascribed to him by the Learned Trial Judge.

This however does not end the matter. What now has to be determined is whether on the evidence as a whole even if the injuries are inflicted by only one person, the other present in the circumstances of this case, is not caught in the common design.

Grounds 3 and 4 relate to the Judge's refusal to uphold the no-case submission made at the end of the prosecution's case and his directions on common design. I find no merit in these grounds.

At the end of the prosecution's case the evidence against Mitchell established that when the taxi cab left the home of the deceased on the fatal night he was in the front seat of the taxi with the deceased being the driver. His statement to the police written under caution establishes that he travelled in the car with the deceased to Sommerset and through Cambridge Hill to the place where the murder took place. He was present when the deceased was murdered.. Although he says the murder

was committed by his co-accused, Desmond and one Shortie, he drove the car from the murder scene to Kingston. He remained with them until the morning when he left with one Spanner. On the Saturday evening he saw Desmond at the coal yard at Spanish Town Road and "I asked him if a de business we go bout and it work out to be a problem (my emphasis). Desmond told him: "You fi go fe you ways and me go fi me." What are the other facts to be considered? He made no report to the police. There is no evidence of the taxi cab being recovered which he said he left in the lane beside the Gas Station on Duke Street.

Now let us examine the evidence against Desmond Robinson. He went with Hopie Mitchell to Bull Bay "to check a car man fi pick up something fi him," (Hopie). They went with the deceased in his taxi to Cambridge Hill direction with Robinson sitting in the front seat. He was present when Hopie killed the deceased in the car with a knife and roll the body over the gully. He drove with Hopie to Old Harbour for the purpose of Hopie selling the car. They remained together in Old Harbour until the Saturday night and then left together to Waltham Park in Kingston. The next week Sunday Hopie came to his yard. He knew he was being implicated because Hopie told him that in respect of the murder his name was being called. He had heard the driver (ie the deceased) say "him girlfriend asked him where him a go and him say him and Hopie a go out." He too made no report to the police. He was clearly a man "on the run".

Counsel for the appellant Mr. Delano Harrison has urged that there is no evidence implicating one accused person rather than the other. When both are jointly charged therefore there cannot arise an inference of guilt on one or the other. I have analysed the evidence in some detail to show the sufficiency of evidence which exists to link both appellants to the crime and on which a jury could conclude that they were linked together by a common design. The deceased was not only murdered but that his taxi cab was stolen in a plan to have it sold. The fact of the appellants

remaining together after the killing coalesces with these other elements to indicate the common design between both appellants. There is no evidence of any coercion by either or the other to remain in each other's company.

Mr. Dennis Morrison QC for the appellant Mitchell likewise made his submissions on the basis that the no-case submission should have been upheld and that no admissible evidence to establish common design existed.

Mr. Brian Sykes for the Crown correctly pointed out that the presence of both accused before, during and after the killing was conduct from which it could be inferred that they were participants. He properly distinguished on the facts the cases which both counsel for the appellants cited to establish a well known proposition that if two persons are charged with an offence and there is no evidence to establish which of them committed the act, although one of them must have done so both must be acquitted. These cases of course are so determined in the absence of evidence of common design.

In my view therefore although the Learned Trial Judge erred in telling the jury that the doctor's opinion was that two persons inflicted the injuries to the deceased nevertheless the evidence established the common design which implicated both appellants. With regard to the error of the Trial Judge if I had thought it necessary I would have in the interest of justice applied the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act.

There still however remains the question of whether this falls within the category of capital or non-capital murder.

The Learned Trial Judge did not direct the jury as he should have done on the provisions of Section 2(2) of the Offences against the Person Act (as amended) which reads:

> **"If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own**

> act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

In every case in which capital murder is charged and which rests upon a common design involving two or more persons the Trial Judge must direct the jury on this section of the Act and its effect so that it can be established that the verdict of guilty of capital murder is based upon a finding by the jury that the convicted person or persons committed acts which place him or them squarely within the provisions of the section. Those ingredients are for the determination of the jury and not the judge. Neither can the Court of Appeal make that determination in the absence of any direction to the jury by the Trial Judge on this issue.

There is in my view no evidence as to which of the appellants "by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person".

This being so both appellants would be entitled to the benefit of Section 2(2) and the murder should have been properly categorised as non-capital.

See *R. v. Aldon Charles,* SCCA 151/95 - Judgment of the Court of Appeal delivered by Gordon JA on 4th November 1996:

> "The evidence must therefore be direct or the inference of guilt must be absolutely inescapable. The directions to the jury must be given with impeccable clarity and the hiatus in the evidence clearly explained."

Consequently we would treat the applications as the hearing of the appeals. The appeals in respect of the convictions for capital murder will be allowed and the convictions quashed and the sentence of death set aside. Substituted therefor in each case is a conviction for non-capital murder with the mandatory sentence of imprisonment for life.

We would order that the applicants be not considered as eligible for parole until each has served twenty years of the sentence which should commence on the 25th of August 1995.